

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO. 767 OF 2005
WITH
CRIMINAL APPLICATION NO. 5234 OF 2005

Shamrao Sadhu Shilimkar ..Appellant

versus

State of Maharashtra ..Respondents

Mr. D. G. Khamkar, Advocate appointed for the Appellant.

Mr. V. B. Konde-Deshmukh, APP for the Respondents - State.

CORAM : D. G. DESHPANDE, &
S. A. BOBDE, JJ.

DATE : 7TH JUNE, 2006

ORAL ORDER :

1. Heard learned counsel for the appellant - accused and the learned APP for the State.

2. In the above appeal, the appellant has filed application for bail. When the application for bail was being heard, learned counsel for the appellant - accused contended that looking to the facts and circumstances, the conviction of the accused under Section 302 cannot be maintained and it can be at

the most a case under Section 304 Part II. He further stated that the prosecution case is that the accused had a brother by name Santosh. The family was joint. Their mother Indubai was mentally sick. Original Accused No. 2 - Sangita was the wife of Shamrao, she is acquitted. Therefore, we, are not considering her case. The accused was living with his wife and daughter at Dhankawadi in a rented room. There was a dispute between the accused and deceased Santosh over a purchase of a room from family income. All the family members had come to Kurungwadi for attending a fair on 4.5.2002. There was a quarrel over a request of Santosh about contribution for enabling Santosh to purchase a room. On the next day Santosh refused to take meal. Again, there was a petty quarrel. It is alleged that wife of the accused abused Santosh. The quarrel ensued where accused is alleged to have started throttling Santosh. Before anybody could come to the rescue, it was found that Santosh had died.

3. In this background of the matter, the learned Advocate for the appellant - accused contended that the accused may have knowledge but no

intention to kill, and, therefore, the offence would not come under Section 302 of IPC. Therefore, he contended that if conviction in the circumstance is altered from Section 302 to Section 304 Part II, his purpose will be served. He also pointed out that the accused is in custody from 5.5.2002. He has completed 4 years sentence and therefore looking to the fact that Section 304 Part II prescribes maximum sentence of ten years, the accused be sentenced for five years.

4. Learned APP also contended that there could not be any intention to kill, in the circumstances, and, he left the matter at the discretion of the Court.

5. We have perused the judgment, the contentions raised by the Counsel for the Appellant - accused getting support from the judgment, and, therefore, in our opinion, the conviction of the accused under section 302 cannot be maintained. In the result, we pass the following order:

ORDER

. Appeal is partly allowed.

. Conviction of the Appellant - accused under Section 302 of the IPC is set aside. He is acquitted of the said charge. However, he is convicted under Section 304 Part II of the IPC and is sentenced to suffer R.I. for five years and to pay a fine of Rs.1,000/- in default R.I. for one month. The accused is in custody from 5.5.2002.

. In view of this order, bail application does not survive, the same also stands disposed of.

(D.G. DESHPANDE, J.)

(S.A. BOBDE, J.)